

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

<b>PATRICIA KAMMEYER, et al.</b>	<b>:</b>	<b>CASE NO.: C-1-01-649</b>
<b>Plaintiffs,</b>	<b>:</b>	<b>Judge Spiegel</b>
		<b>(Magistrate Black)</b>
<b>vs.</b>	<b>:</b>	
<b>CITY OF SHARONVILLE, OHIO, et al.</b>	<b>:</b>	<b>JOINT MOTION OF DEFENDANTS</b>
		<b>TO CERTIFY QUESTION OF STATE</b>
<b>Defendants.</b>	<b>:</b>	<b><u>LAW TO OHIO SUPREME COURT</u></b>

Defendants City of Sharonville, Ohio ("City"), Michael Schappa, William Nuss and James Cramer, by and through counsel, jointly move this Court to certify the following question to the Ohio Supreme Court:

Is Ohio Revised Code Chapter 2744 constitutional?

The basis for this motion is that:

1. this Court has found that there is no controlling precedent in the decisions of the Ohio Supreme Court on the question of whether Ohio Revised Code Chapter 2744 ("2744") is constitutional;<sup>1</sup> and
2. the answer to this question may be determinative of the proceedings.<sup>2</sup>

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<sup>1</sup>It is the Defendants' position that there is controlling Ohio Supreme Court precedent that establishes that §2744 is constitutional.

<sup>2</sup>A finding that §2744 is constitutional may and, as Plaintiffs themselves have admitted, in all likelihood will result in the dismissal of all claims against the individual defendants and all but the federal claims against the City.

Respectfully submitted,

s/Brian E. Hurley

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### **MEMORANDUM**

In an earlier decision in this case this Court held that Ohio Supreme Court law casts sufficient doubts upon the constitutionality of §2744 to permit it to conclude that §2744 violated plaintiffs' rights to a trial by jury under the Ohio Constitution. *Kammeyer v. City of Sharonville*, 311 F.Supp. 26 653 (S.D. of Ohio 2003). In reaching its decision this Court relied upon the dicta of a three justices of the Ohio Supreme Court in *Butler v. Jordon*, 92 Ohio St.3d 354 (2001). Defendants respectfully submit that this Court's reliance is based on a misapprehension of the current state of the relevant law in Ohio. More specifically, that law establishes that:

1. The Ohio Supreme Court has explicitly held "that R.C. §2744.02(B)(4) does not violate Section 16, Article 1 of the Constitution of Ohio." *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, at 355.

2. *Fabrey* has been recognized numerous times by appellate courts in Ohio as binding law in applying and construing §2744. Moreover, each Ohio appellate court that has been faced with the issue has found §2744 to be constitutional. (See pp. 77-83 of the City's and Schappa's motion for summary judgment. (Doc. 233.)) In fact, the First Appellate District has done so as recently as March, 2005.

First, Copeland and Johnson argue that the doctrine of sovereign immunity as recognized in R.C. Chapter 2744 is unconstitutional in that it deprives them of any recourse that they might have as a result

of Copeland's injuries, in violation of Section 16, Article I of the Ohio Constitution. Courts in Ohio, including the supreme court and this court, have rejected this argument.

*Copeland v. Cincinnati* (2005) 159 Ohio App.3d 833, at 836.

3. The language in *Butler* upon which this Court and Plaintiffs rely is dicta and two of three justices who concurred in that dicta are no longer members of the Ohio Supreme Court.

4. Each of the Ohio courts of appeal that has ruled on a party's argument based upon *Butler* that §2744 is unconstitutional has rejected that argument. (See pp. 77-83 of Doc. 233.) Nevertheless, this Court has made a finding that there is no controlling precedent in the decisions of the Ohio Supreme Court on the question of whether §2744 is constitutional, and, as such, the first requirement for certification has been met.

The second requirement for certification is also present here. With the exception of the federal claims against the City, Defendants have moved to dismiss all claims on the basis that they are immune under §2744. Accordingly and as Plaintiffs themselves admit,<sup>3</sup> if §2744 is found to be constitutional, it may be determinative of all claims made against the individual defendants and all but the federal claims made against the City.

For the reasons stated above, Defendants' Motion To Certify Question Of State Law To The Ohio Supreme Court should be granted.

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<sup>3</sup>On page 3 of their Response To Defendants' Citation of Supplemental Authority (Doc. 291) Plaintiffs state that, "[i]f Chapter 2744 of the Ohio Revised Code were applied to this case, the plaintiffs would be denied their rights to remedy and trial by jury as guaranteed by the Ohio Constitution." By making this statement Plaintiffs are admitting that a finding that §2744 is constitutional will require a dismissal of all of their claims in this lawsuit other than the federal claims against the City.

Respectfully submitted,

s/Brian E. Hurley

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CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2005, a copy of the forgoing was filed electronically. Notice of this filing will be sent to all registered parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/Brian E. Hurley  
Brian E. Hurley

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